United States Circuit Court of Appeals for the Ninth Circuit

No. 10242

RUFO C. ROMERO, Appellant,

vs.

P. J. SQUIER, Warden, McNeil Island, Appellee.

BRIEF ON BEHALF OF APPELLANT.

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Jurisdictional Statement.

Jurisdiction in this court is vested by United States Code, Title 28, Sections 452 and 463.

Statement of Case.

This is an appeal from the judgment of the District Court for the Western District of Washington dismissing a petition for a writ of habeas corpus, in which appellant was the petitioner, and the appellee was the respondent. In the District Court appellant submitted that he was unjustly and unlawfully imprisoned by color of authority of the United States, in custody of the warden, McNeil Island, Washington, and the cause or pretext of such detention and imprisonment was a certain order of commitment by

a general court martial held and convened at Fort William McKinley, Philippine Islands, on November 25, 1940, ordering that appellant be imprisoned in said jail for a period of 15 years; that said restraint and detention are illegal and in violation of Article IV and Article VI of the Amendments to the Constitution of the United States; in violation of the Act of June 4, 1920 (chap. 227, subchap. II, Articles 17, 35, 70, 41 Stat. 790, 794, 802); and is contrary to law.

Appellant, Rufo C. Romero (14th Engineers, Philippine Scouts) was charged with violation of the 96th Article of War. There were four specifications of conspiracy to unlawfully communicate certain maps marked secret to certain persons not entitled to receive such communication, and unlawfully reproduced certain maps marked secret (R. pp. 7, 8). The maps were withdrawn at the conclusion of the trial and not made a part of the Record. The importance and secrecy of the maps as emphasized by the prosecution was doubtful and questioned, for they were only old maneuver maps, obsolete, and some of them were of the kind usually used as wrapping paper at the engineer headquarters.

In order to obtain evidence against appellant, one Major J. K. Evans, Chief of Intelligence, Philippine Department, United States Army, employed one Anis Gepte who, in turn, employed the services of two individuals to accomplish the scheme and solicited and induced appellant to show him the maps in question. Major Evans himself testified that he told Anis Gepte what to ask (R. p. 285). It was his instigation, through prosecution's principal witness, Anis Gepte, that the maps were allegedly shown (R. p. 266). The appellant's house where he was searched and arrested was situated outside of the military reservation.

Major Evans made arrangements with officers of the Philippine Constabulary who are possessed of police authority, to secure search warrant (R. p. 273; Tr. p. 148).

A warrant was issued by the justice of the peace of the town of Pasay, Province of Rizal, Philippine Islands (a copy of which was made a part of the Record, Transcript p. 185), directed to any police officer directed to search the residence of appellant for "stolen maps belonging to the United States Army", and if such were found, to bring it forthwith before him in the justice of the peace court of Pasay, Rizal. Major Evans had no warrant from any source (R. p. 290; Tr. p. 151). When all was in readiness according to his plans and instructions, he, in company with the police officers armed with search warrant issued by the justice of the peace, entered the residence of appellant (R. p. 273). He searched the house, took possession of anything that might be used against appellant, arrested him and took him into custody at Fort William McKinley. He also took the articles he seized to Fort William McKinley (R. p. 274; Tr. 150).

During the preliminary investigation, appellant requested the services of one Major Lynch, a retired Army officer and a lawyer of high standing, but the investigating authority denied this request. Then appellant further requested that one Major Poblete, a Filipino U. S. Army officer and a capable lawyer, to represent him. This was also denied by the Army authorities. Finally, at the beginning of the court-martial trial, appellant was allowed to engage a civilian counsel who was a member of the Philippine bar. But at the early stage of the trial the court martial excluded this counsel from the court room (R. p. 202; Tr. 128-29). (See photographic copy of a newspaper of Benjamin de Guzman's letter taken from the Library of Congress on last part of this brief.)

Statement of Points.

1. The District Court erred in holding that a search warrant issued by the justice of the peace of a municipality of

a town in the Philippine Islands could be used as the basis of a Federal search and prosecution.

2. The District Court erred in holding that the exclusion from the court room during certain stage of the trial, of appellant's counsel, was not a violation of the Sixth Amendment to the Constitution of the United States.

3. The weight of authority that prosecution cannot be had and could not stand, where it appeared that the accused was induced or led to commit the act charged by active cooperation and instigation of public officers, was neglected by the District Court.

4. The District Court erred in holding that the Record of the court martial transmitted to the Judge Advocate General was not defective even when the maps introduced in evidence were not included.

5. When the court martial invaded the constitutional rights of appellant the court thereby lost its jurisdiction and was no longer a court of competent jurisdiction—it was then the duty of the District Court to release appellant upon writ of habeas corpus.

Summary of Argument.

I. The District Court erred in denying appellant's contention that the search, seizure, and arrest was unconstitutional when the Federal officer used a police warrant issued by the justice of the peace as the basis of the Federal search and prosecution.

II. Appellant was not given a fair and impartial hearing during the preliminary investigation. Exclusion from the court room of any of appellant's counsel was a clear invasion of his constitutional right; whenever the relation of client and attorney existed appellant had the guaranteed

right of having counsel represent him in *any, all,* and *every* stage of his case, and the fact that appellant may have been defended by the military counsel does not abridge his right to have counsel of his own selection and as many as he may see proper to defend him.

III. The District Court erred in not holding that the act charged appellant resulted through the direct instigation of the Federal officer and his agents and its commission procured by them.

IV. When the maps introduced in evidence were removed and not included in the Record transmitted to the Judge Advocate General for final review and confirmation, the act of June 4, 1920 (41 Stat. 794) which is also article 35 of the Articles of War, was violated and the Review Board in the office of the Judge Advocate General had no authority to approve the decision of the court martial when the Record was defective.

Argument.

I. The District Court erred in not holding that appellant's constitutional right against unlawful search and seizure was violated when the police warrant was used as the basis of the search and prosecution. The Federal officer indirectly did what he was prohibited from doing directly.

Major Evans made arrangements with the police officers to secure a search warrant; and then accompanied and was one of the leaders of the raiding party.

Major Evans himself had no warrant from any source nor authority to search and arrest appellant. Yet he was the first one to enter appellant's house; searched the premises; took with him everything that could be used against appellant and took him into custody at Fort William McKinley. In substance, the result was that the whole under-

taking was exclusively his own. The basis of the District Court's ruling on this point was the alleged stipulation between the prosecution and defense (which appears on R. p. 297; Tr. 156) as follows:

> Prosecution: * * * The prosecution and defense join in stipulating that the search warrant authorizing the search on the premises and person of the accused, at 100 Del Pan Street, Pasay, Rizal, Philippine Islands, on October 16th, 1940, was issued and executed by competent authority under the laws of the Philippine Commonwealth. This stipulation is being made to permit the continuance of the trial at this time, and with the understanding that the original of the search warrant will be produced in court at a later date.

This stipulation was nothing but merely an understanding that the search warrant was issued out of a competent authority, the justice of the peace, and its execution by police officers under the laws of the Philippine Commonwealth. It was not a stipulation that Major Evans had an authority to enter and search appellant's premises nor was it stipulated that Major Evans was competent to execute a warrant issued by a civil court of the Philippines. Furthermore, the accused has the constitutional right to be safeguarded against unlawful search and seizure, and counsel cannot make stipulations which operate as a surrender of his substantial rights (*Ball* v. *Bank of State,* 8 Ala. 590, 42 Am. Dec. 649; *Wabash, St. L. & P. R. Co.* v. *McDougall,* 18 N. E. 291). Stipulations by counsel as to matter of law have also been held to be of no effect (*New Jersey Title Guarantee & T. Co.* v. *McGrath,* 224 Fed. at p. 759). Also, counsel has no authority to surrender the rights possessed by his client. Nor could counsel bind his client by admission or stipulation prejudicial to the client's cause of action or defense (2 R. C. L. 990). This procedure followed by Ma-

jor Evans was objected to by appellant's military counsel (R. p. 294; Tr. 153):

> Defense Counsel: May it please the court, the defense, at this time, objects to the admissibility of this evidence until it is proven that the search was legally conducted. It is true the witness has testified that he had in his possession a search warrant, but so far, there is nothing to show that the warrant was legally issued, nor that it directed a search of the house of Captain Romero, nor for what purpose the warrant was issued. These facts, I believe, should be proven before the testimony is admitted.

and by appellant himself (R. p. 555; Tr. 177) in this term: "* * * I believe, therefore, that these maps should be rejected as evidence, because Major Evans has no authority to execute a search warrant issued by civil courts of the Philippine Islands. * * *"

The question then arises whether Major Evans, not vested with police authority, could execute a search warrant issued out of a justice of the peace in the Philippine Islands; and if such warrant could be used as the basis of a Federal search and prosecution. Various Federal courts, including the Supreme Court of the United States, had occasion to rule on this question and they are unanimous in holding that a state or police warrant when executed by Federal officers, may not be used as the basis of a Federal prosecution. That would be a violation of an accused's constitutional right against unlawful search and seizure guaranteed him under the Fourth Amendment. (*Garske* v. *United States,* 1 F. (2d) 620; *United States* v. *Costanzo,* 13 F. (2d) 259; *Mann* v. *Commonwealth,* 279 S. W. 1079; *United States* v. *Spallino,* 21 F. (2d) 567; *Byars* v. *United States,* 273 U. S. 28.)

In the case of *Byars* v. *United States, supra,* the warrant to search described premises was in the hands of local po-

lice officers and accompanied by a Federal agent. The Federal agent had no warrant nor authority to enter the residence. The search and seizure was made entirely upon the authority of the police warrant. The Federal agent found some unlawful stamps and kept them together with those found by the other members of the raiding party. In this instance the Court stated that:

> "Whether the warrant was good under the local laws is not necessary to inquire, since in no event could it constitute the basis for a Federal search and seizure. Nor was it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. While it is true that the mere participation in a state search by one who is a Federal officer does not render it a Federal undertaking, the Court must be vigilant to scrutinize the attendant facts with an eye to detect, and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of persons and property are to be liberally construed, and it is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The participation of the Federal officer was under color of his Federal office and the search in substance and effect was the joint operation of the local and Federal officers. In that view, so far as the inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own."

An unlawful search cannot be justified by what is found. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people. *United States* v. *Slusser,* 270 F. 818; *United States* v. *Bush,* 269 F. 455; *United States* v. *Costanzo,* supra.

II. Appellant was denied the right to be represented by counsel of his own selection. At the preliminary investiga-

tion he requested the assistance of a Major Lynch, who was a member of the Philippine bar, but the military authorities denied the presence and assistance of this counsel, as verified by the following statement of appellant:

> "Shortly before the investigation of the charges against me, I was permitted to see a lawyer—a certain Mr. Lynch—an American. At the investigation Mr. Lynch was not allowed to be present, and in answer to a letter of his, respectfully inquiring why he was denied attendance in spite of my request, he was told that it was not necessary that he be present. Mr. Lynch thereupon resigned as my counsel, remarking that the attitude of the military authorities was such that there was nothing he could do for me. My investigation was thus conducted without the benefit of counsel."

Then he requested the services of one Major Poblete, an Army officer and capable barrister, to represent him in the defense of his case, but this request was also denied. The testimony of two witnesses against appellant, during the investigation, was taken not in the presence of the accused, though this testimony was used against him in support of a recommendation for court-martial trial. It clearly shows that appellant was not given a fair and impartial hearing during the investigation. The assistance of counsel is essential to a fair hearing, and he is to be allowed the presence and advice in the preliminary investigation. If an accused was denied counsel at the preliminary investigation, he was not accorded the fair and impartial hearing guaranteed to all persons whose liberty is involved (Ex parte *Lam Pui,* 217 Fed. 456). In order to afford an accused a hearing consistent with the due process clause of the Constitution the government must allow him a fair opportunity and the right to secure counsel of his own choice. (11 Am. Juris. 1107; Ex parte *Chin Loy You,* 223 Fed. 833.) By direction of the

President, the War Department, under date of December 29, 1938, issued Circular No. 79, for the purpose of giving persons fair and impartial trial, which provides: "No charge shall be recommended for trial by general court-martial unless, prior to such action, the thorough and impartial investigation thereof required by A. W. 70 shall have been made by an officer." * * * "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made." Examination of the preliminary proceedings in the Record shows that no counsel appeared for appellant. Likewise, no counsel represented and prepared his defense from the time of his arrest to the day of his trial. In the famous Scottsboro trial, *Powell* v. *Alabama,* 287 U. S. 85, the defendants were represented by counsel appointed by the court in the preliminary hearing. No counsel prepared the case for the defense between the preliminary hearing and the day of trial. And when the trial started, the court appointed all the members of the bar in the city, and about two lawyers agreed to participate for the defense. The Supreme Court of the United States ruled that the defendants were not given effective aid so as to make it a fair trial, and they were not represented by counsel within the meaning of the Sixth Amendment to the Constitution.

At the beginning of the trial a military counsel was appointed for the defense and a civilian attorney who was a member of the Philippine bar, was recognized as one of the appellant's counsel. But at the early stage of the proceeding especially when the maps were to be introduced in evidence, the court martial excluded this civilian counsel from the court room. While it could be stated that the court martial acted in pursuance of a certain Army regulation as to divulgence of military matter to non-military personnel, appellant submits that such regulation is not superior enough to override the Constitution of the United

States which guarantee an accused the right to be represented by counsel at any, every, and all the stages of a proceeding. When the court martial recognized the civilian counsel, he thereby became an officer of that court—a part of that court. When the counsel was excluded, the court martial became incomplete and was no longer a court of competent jurisdiction (*Johnson* v. *Zerbst,* 304 U. S. 458). It would be disregarding and abridging the trust and confidence bestowed upon attorneys in the court rooms. They are entitled to be trusted to all secret and confidential matters before the court, otherwise would be defeating the intent and purpose of the statute and the Constitution. The District Court was of the opinion that appellant was always represented by counsel because the military defense counsel was always present, and no objection was raised when the civilian defense counsel was ejected. But it was not that type of representation that would have given effective aid, and the type that would fulfill the requirement of the Sixth Amendment. It must be remembered that the military defense counsel was not a member of any bar. A defendant is entitled to be represented not only by one who is a member of the bar but by a competent counsel—a capable practitioner (*Achtien* v. *Dowd,* 117 F. (2d) 989). The accused has the right to have all his counsel represent him during his entire trial, and it is reversible error to exclude them, or any one of them, from the court room at any stage of the trial (Cooley's Constitutional Limitations, p. 703). Exclusion from the court room of any of his counsel is a clear invasion of his constitutional right notwithstanding the other counsel who remain are capable of taking care of his interests (*Jackson* v. *State,* 115 S. W. 262). In this case the court laid the principle that:

> "The defense of an accused by counsel is a very valuable right, and one which is guaranteed him by our Constitution and laws, and whenever the relation of

client and attorney exists the accused has the guaranteed right of having counsel represent him at any, all, and every stage of his case while before the court. The fact that accused may have been ably defended by other counsel does not abridge his right to have counsel of his own selection, and as many as he may see proper to employ to defend him."

In *Johnson* v. *Zerbst,* 304 U. S. 458; decided May 23, 1938, the Supreme Court of the United States stated the principle, which is universally followed, as follows:

"A person charged with crime is entitled by the Sixth Amendment to the Constitution to the assistance of counsel for his defense. The right may be waived, but the waiver must be an intelligent one, and whether there was such must depend upon the circumstances and particular facts, including background and conduct of the accused. If the accused is not represented by counsel and has not waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. The Sixth Amendment withholds from Federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel. *Barron* v. *The Mayor,* 7 Pet. 243; *Edwards* v. *Elliott,* 21 Wall. 532, 557.

True, habeas corpus can not be used as a means of reviewing errors of law and irregularities—not involving question of jurisdiction—occurring during the course of the trial; and the writ of habeas corpus cannot be used as a writ of error. These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed —since the adoption of the Sixth Amendment. Congress has expanded the right of a petitioner for habeas corpus.

> Since the Sixth Amendment constitutionally entitles one charged with a crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty. A court's jurisdiction at the beginning of a trial may be lost "in the course of the proceedings" due to failure to complete the court as the 6th Amendment requires. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus."

In *Smith* v. *O'Grady,* 61 Sup. Ct. 572 (decided Feb. 17, 1941), the Supreme Court of the United States stated that the Constitution is the supreme law of the land, and the obligation to guard and enforce every right secured by the Constitution rests on the State courts and equally with the Federal courts, and judgments rendered in violation of it cannot stand.

When appellant's constitutional right against unreasonable search and seizure was violated, and further denied the assistance of counsel of his selection, any proceedings thereafter was a denial of due process of law as secured by the Fifth Amendment to the Constitution and such proceedings are void, and the court martial no longer has authority to proceed, and was no longer a court of competent jurisdiction. (*Byars* v. *United States,* supra; *Powell* v. *Alabama,* supra; *Johnson* v. *Zerbst,* supra; and *Smith* v. *O'Grady,* supra.)

III. Prosecution cannot be had where it appears that the accused was induced or led to commit the act charged by active cooperation and instigation of public officers.

There is no doubt that the act complained of was at the direct solicitation and instigation of Major Evans and

his agent. The alleged co-conspirators, Agbay and Cabrera, and the prosecution's principal witness, Anis Gepte, agreed among themselves to frame-up appellant. The witness, Agbay, testified that he was solicited and offered reward by the government agent, Gepte, to "frame-up" Captain Romero (R. p. 447; Tr. p. 167), as shown in the following testimony:

> Question: Did you receive any offer of reward or pay?
> Answer: Yes, sir.
> Question: What was offered you?
> Answer: Cash was the offer, and promise of a position as secret service or agent of the Philippine Constabulary, in case we will be successful in the case he is after.
> Question: What case was that?
> Answer: The case—the frame-up case that he proposed to me.
> Question: And who was the party to be framed?
> Answer: Captain Romero.

The witness Cabrera testified to the same effect (R. pp. 513, 524-25; Tr. pp. 171-172). The prosecution's principal witness, Gepte, testified that it was at Major Evans' instigation that the maps were solicited and shown to him (R. p. 266). Major Evans testified that he told his agent, Gepte, what maps to ask and be shown (R. p. 285; Tr. 150). On cross-examination Major Evans testified:

> X Q. The witness Gepte testified among other things that you told him to obtain the plan of the defense of Bataan or of the Philippines, I cannot recall which.
> A. I myself testified that I told him what to ask. * * *

It is reasonably clear that the Government officer and his agent were not engaged in detecting crime, but they instigated and created the act and procured its commission. This type of procedure and practice by public officers is

denounced by the courts as scandalous and against public policy. This practice cannot be tolerated and conviction of crime or offenses so procured cannot stand. (*United States* v. *Healey,* 202 F. 349; *United States* v. *Adams,* 59 F. 674; *Dalton* v. *State,* 39 S. E. 468.)

In the case of *United States* v. *Healey,* supra, the court substantially said:

> "Decoys are permissible to entrap criminals, or to present opportunity to those having intent or who are willing to commit crime, but not to create criminals, or to ensnare the law-abiding into committing an offense without intent to do so. One is relieved of the obligation by the government's invitation, which is in the nature of fraudulent concealment and deceit, and if not consent, yet does work an estoppel. If the accused violated a statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. That the accused is suspected of any violation of law, does not justify instigating and entrapping; for thereby a law-abiding person may as easily be ensnared. This practice cannot be tolerated and conviction of offense so procured cannot stand.

In *United States* v. *Adams,* supra, the court stated the principle that courts will not lend aid or encouragement to government officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime in order that they may arrest and have them punished for so doing. The encouragement to persons or criminals to induce them to commit crime in order to get a prosecution against them is scandalous and reprehensible.

The only time appellant met the individuals was a day before his arrest when he was solicited about the maps. As among appellant's duties was the investigation of subversive activities he consented to this request, to impress upon them that appellant had access to some maps and able

to reproduce them, so that the alleged principal, the mythical sultan, would be brought before him with the idea of having him arrested.

The Merit of the Case.—The specifications charged that appellant conspired to communicate secret maps to persons not entitled to receive the communication. The Record shows that Gepte, the prosecution's principal witness, was working for Major Evans and received instructions from him. Gepte for himself employed the two alleged co-conspirators, Agbay and Cabrera, to work for him to solicit the act. The result, then, was that all these three individuals were the agents of Major Evans. Since Major Evans, a United States Army officer, was entitled to see the maps, it could not be legally stated that the maps were shown to unauthorized persons or persons not entitled to receive the communication. Furthermore, the contents of the maps were not understood by the witness and co-conspirators. The witness, Gepte, could not identify the contents, nor the maps he alleged he saw. In order to have communication, there must be an understanding and meetings of the minds. When Gepte approached appellant the pretense was that a certain sultan in Mindanao (no such person in existence) desired to buy some maps. Since the supposed buyer was but a mere imaginary person, a mythical sultan, no crime could have been committed, nor an intent to commit a crime imputed to appellant.

IV. The act of June 4, 1920 (41 Stat. 794) and articles 35 and 50½ of the Articles of War were violated when the maps introduced in evidence were withdrawn and not included in the Record transmitted to the office of the Judge Advocate General. The article of war involved is as follows:

> "Article 35: The trial judge advocate of each general court-martial shall, with such expedition as cir-

> cumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All the records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army."

The court martial had no authority to withdraw the maps introduced in evidence. It was the intent of the statute to transmit all the evidence introduced, and nothing should be withdrawn regardless of its class or nature. This is verified by part of section 75, Manual for Courts Martial, page 59:

> "Where a document, which must or should be returned to the source from which it was obtained (e. g., an original record), is received in evidence or marked for identification, a suitable copy or extract copy thereof, certified as such by the trial judge advocate, will be substituted for such document so as to permit of such return."

The importance of the maps as emphasized by the prosecution had been doubtful. The testimony of some of their own witnesses lead to this assertion. Those maps were part of no secret or war plans, but were simply maps containing some data of past maneuvers. A prosecution witness testified that the maps were obsolete and of no further use, and were to be turned in, according to the usual procedure, to the office of the Department Engineer at Manila (R. p. 363). Some of the maps were of the type habitually used as wrapping and sketching paper at the engineer headquarters (R. p. 365). The obsolete maps found in the trunk of appellant's automobile were to be returned to the Department Engineer at Manila (R. pp. 363, 368, 370). While it is true that there were other maps found in appellant's residence at the time of his arrest, it is equally true that, since he was a topographical officer of the

14th Engineers, he kept such maps in his quarters for one of the following purposes: To study or correct them; to use them in preparation for reconnaissances, maneuvers, or surveys; and to use them in trips taken for map correction purposes.

The maps were the gist of the evidence from which appellant was convicted, yet they were not included in the Record transmitted to the Judge Advocate General. The review board which was to review and approve the decision had no authority to approve the sentence of the court-martial when the Record was so defective. The Attorney General of the United States had occasion to interpret Article of War 35, and stated his opinion on what must be included in the Record. In 3 *Op. Atty. Gen.* 545, the Attorney General stated:

> "It is not sufficient to return the inference or conclusions of the court-martial nor mere statements of the evidence inspected; but the evidence itself on which they based judgment must be returned. It is improper for the reviewing authority to make any decision in regard to the effect of a certain act of Congress, in cases where the Record is so defective. The Record would not exhibit the facts of the case in such form as would have authorized the review board to pass upon them. As no sentence of a general court-martial can, pursuant to the act of Congress of June 4, 1920, article of war 50½, be carried into execution until it is approved by the review board for transmission to the President for confirmation, it is essential that the Record should contain all the evidence; and that, in order to a confirmation, such evidence should sustain the finding of the court. It would not be proper for the reviewing authority to make any decision in regard to the effect of the act of Congress of June 4, 1920, when the Record is defective in presenting, in the usual and legal form, the facts on which the correctness of such decision must depend."

The District Court had the opinion that if the maps were included in the Record, they may have been published and their contents divulged to the public. This is not so. The United States Army in the Philippines used to send maps and matter to the War Department in Washington, D. C., which were of the highest secret and confidential nature. There was no possibility of the public getting access to such matter. The deliberations of the Review Board in the office of the Judge Advocate General are confidential and the public nor the press had no access to such deliberations.

It seems very interesting and material to note part of the District Court's oral opinion which states as follows: "If the petitioner had a civilian attorney and no other counsel and if such civilian counsel had been excluded for a while from the proceedings Mr. Semsem would have had a very much more favorable case. Likewise, if the then defendant had objected to the proviso that the maps were to be later removed Mr. Semsem would have had very much more of an opportunity now to get the results he seeks." As to the exclusion of counsel, it has been discussed briefly in Argument No. II. With regards to the alleged failure of appellant to object to the withdrawal of the maps, it cannot be legally stated that appellant nor his military counsel did not object. It was the administrative duty of the court-martial and the trial judge advocate to preserve and put in the Record all the evidence introduced or inspected, as required by the statute—there is no alternative for them to follow—they have only one mandatory duty regarding the evidence inspected—the duty to include in the Record the maps that were put in evidence. Furthermore, the objection was not waived, and there was no waiver of objection where a formal objection should have been raised, according to a provision in the Manual for Courts Martial. Therefore appellant was deemed to have objected in every instance in the proceedings, although no verbal objection

was formally raised. This is supported by subsection (c) pages 136 and 137, Manual for Courts Martial, which is as follows:

> *c. Waiver of objections.*—The prosecution or defense may in open court either orally or in writing waive an objection to the admissibility of offered evidence. Such a waiver adds nothing to the weight of the evidence nor to the credibility of its source. The court in its discretion may refuse to accept, and may permit the withdrawal of, any such waiver. There is no prescribed form for making a waiver. Thus, if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection. *However, a waiver of an objection does not operate as a consent where consent is required, and a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual.* (Emphasis supplied.)

The point herein involved not being specifically indicated in the Manual for Courts Martial as one that should have been formally objected, it therefore stands that appellant did not consent nor waived the objection to the withdrawal of the maps from the Record. Appellant had objected to the admission of the evidence on the ground that it was unlawfully seized. Likewise, appellant did not consent to the exclusion of his counsel of his own selection.

Authority of a court martial is derived from the statute, and it must proceed in conformity therewith. Being an inferior court of limited jurisdiction, its judgments may be attacked collaterally, and the validity of its proceedings can be revised upon a hearing in habeas corpus (*McClaughry* v. *Deming,* 186 U. S. 49; *Runkle* v. *United States,* 122 U. S. 543). In *Dynes* v. *Hoover,* 61 U. S. at p. 81, the Court said: "Persons belonging to the Army and Navy are not subject to irresponsible courts martial, when the law

for convening them and directing their proceedings or organization and for trial have been disregarded. In such cases everything which may be done is void—not voidable; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or judgment. In *McClaughry* v. *Deming,* supra, the Court stated that to give effect to its sentence, it must appear affirmatively and unequivocally that the court martial was legally constituted, that it had jurisdiction, that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. The absence of any of these indispensable conditions renders the sentence and judgment of a court martial *coram non judice,* and absolutely void, because such judgment and sentence is rendered without authority of law and without jurisdiction (*Mills* v. *Martin,* 19 Johns. (N. Y.) 17; *Smith* v. *Shaw,* 12 Johns. (N. Y.) 257).

Conclusion.

The judgment of the District Court should be reversed, and a writ of habeas corpus be issued by this Honorable Court directed to the Warden, McNeil Island, Washington, and that your appellant be ordered discharged from detention and imprisonment thereat. And for such other and further relief as to the Justices of this Court may appear and seem just and proper.

Respectfully submitted,

Pedro P. Semsem,
Attorney for Appellant,
322 C St. S. E.,
Washington, D. C.

His letter sent to the court this morning follows:

"5 Cementina, Pasay, Rizal
"November 13, 1940

"The President
"Court Martial
"Fort William McKinley
"Sir:

"I have the honor to submit herewith my withdrawal as associate defense counsel of Captain Rufo C. Romero for the reasons stated below. In this connection it behooves me to express myself with the same frankness with which the American people are reputed to be. Before proceeding, however, allow me to give a brief summary of the incidents which occurred before the trial of the accused.

"At the very outset the accused Captain Rufo C. Romero engaged the services of Major Thomas A. Lynch to act as his chief defense counsel. Major Lynch, however, had to withdraw in disgust because his communications with the proper authorities at Fort Wm. McKinley were not given proper attention. Then the accused requested for the services of Major Ricardo Poblete and the latter was willing to act as the chief defense counsel of the accused. However, this request after being held in abeyance for sometime was finally turned down by the Chief of Staff of the Philippine Army. This being the case the accused gave up all hopes of choosing the officer to defend him and left this matter entirely in the hands of the U. S. Army authorities. Hence Major Johnston and Captain Ivy were appointed to act as defense counsel of the accused. With this as background, I shall now state the reasons why I withdraw from this case.

"First of all, I feel that the chief defense counsel and his assistant are not sincerely aiding the accused. On the contrary they are at times only strengthening the case of the prosecution by their silence. The claim that the best interest of the accused could be better served by keeping silent is too far-fetched. I, as mere associate defense counsel, cannot of course go beyond what the chief defense counsel desires.

"In the second place, the accused is not given a fair chance to have his mental condition examined by alienists. After the motion to have the accused examined by medical officers of the U. S. Army has been denied, a request was made to the proper authorities to allow civilian alienists to examine the mental condition of the accused. However, before this request could ever be approved by the commanding officer, the trial judge advocate who is the chief prosecuting officer in this case is given a hand to approve or disapprove the request before the commanding officer gives his final approval. In other words the accused is left at the mercy of the prosecuting officer.

"In the third place I feel that my presence in the court martial is not pleasant to its members. With my withdrawal, the court can now go on with its desire. The accused is even willing to waive his presence in court. Therefore, the prosecution, the court, the defense counsel and the public opinion can now have their 'pound of flesh.' But before I close may I hope that this letter of mine shall serve as warning to the end that we may not witness in this country what Hitler appropriately calls 'the baptism of blood.'

"Very truly yours,
"BENJAMIN C. DE GUZMAN
"Associate defense counsel of
"the accused Rufo C. Romero
"(Capt. P.S.)"